

The complaint

Mrs S complains about a used car she acquired through a hire purchase agreement with Borderway Finance Limited. Very shortly after acquiring the car Mrs S reported a problem with the dynamic anti roll bar, requiring its replacement. Mrs S is unhappy that this will be an expensive repair and believes the car was defective when it was supplied. Mrs S initially wanted the car repaired without incurring a cost but as significant time has now elapsed, Mrs S would like to reject the car and be refunded what she has paid.

What happened

On 8 January 2022 Mrs S acquired a used vehicle that cost £16,995. The car was around 11 years old and had travelled 85,152 miles by that time. In addition to a part exchange value, Mrs S funded the remainder of the car through a hire purchase agreement with Borderway. On 27 March 2022 Mrs S says one of the car's warning lights illuminated and after investigation this indicated that there was a leak to the dynamic anti roll bar. Considerable work is required replacing this item and this would result in a sizeable repair cost in excess of £4,000. The repair cost was subsequently reduced but this was still over £2,000.

Mrs S complained to the dealership where she got the car and also to Borderway as the supplier of the car through the hire purchase agreement. Borderway issued its final response to Mrs S and explained why it didn't consider it was responsible for the costs of repairing the car. In summary, it said that based upon the evidence of work carried out prior to the vehicle being supplied to Mrs S it does not believe it is liable. I should add that the letter does not list the work carried out to the vehicle before it was supplied to Mrs S, but I understand there was some maintenance and an MOT before Mrs S collected the car. The letter suggests that Mrs S should liaise with the dealership should she wish to accept the offer of repair at a reduced cost.

Mrs S remained unhappy with the response from Borderway so referred her complaint to our service. It was considered by one of our investigators, who explained why they didn't consider the car was of satisfactory quality when it was supplied to Mrs S and that Borderway was responsible for putting things right. The investigator concluded, amongst other things, that Mrs S should be able to reject the car and end the hire purchase agreement with nothing further owing.

Borderway did not accept the investigator's conclusions and refers to the pre-sale work and MOT that it believes would have identified an issue if it was there pre-sale. It does not consider Mrs S would have been able to drive for three months if this issue was present at the time the car was supplied. Borderway did however offer to collect the car and return it to Mrs S without charge (Mrs S lives over 300 miles from the dealership), arrange for the dealership to repair the faulty part that was originally complained about and pay £150 for the distress and inconvenience.

Mrs S did not accept the offer and is concerned about how long the car has been idle as it cannot be used. Mrs S believes this may have caused other problems with the car and would prefer to reject the car.

As the complaint could not be resolved informally it has been referred to me so that a final decision can be issued, as the last stage in our process.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I would first like to acknowledge that I am very aware that I have summarised the circumstances surrounding this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

Mrs S acquired the used car through a hire purchase agreement with Borderway. The hire purchase agreement is a regulated consumer credit agreement and because of that our service is able to consider complaints about the agreement. As the provider of the hire purchase agreement Borderway is also the supplier of the car to Mrs S. As the supplier of the car Borderway is responsible for the quality of the car and the Consumer Rights Act (CRA) implies terms into the hire purchase agreement requiring the car to be of satisfactory quality. Exactly what is satisfactory quality will depend on the specific circumstances of any given case. In this instance, where the complaint relates to a car, I think it reasonable that when considering whether the car is of satisfactory quality the car's age and mileage at the time it was supplied and when the fault occurred are all key considerations.

The requirement on Borderway is to ensure the car was of satisfactory quality at the time it was supplied. So Borderway would not be responsible for any general wear and tear items that develop over time and might reasonably be expected on a used car with this age and mileage. The car that Mrs S acquired cost £16,995, was around eleven years old and I understand had travelled 85,152 miles. When considering a car of this age and mileage it would in my view not be unreasonable to expect it to be showing signs of wear and tear and not be in the same 'as new' condition that it would have been in when first manufactured. This will be in relation to the mechanical components and its cosmetic appearance. The price Mrs S paid for the car was not insignificant. But this is considered a prestige model and would have been considerably cheaper than the cost of the car new. The significantly lower price Mrs S paid reflects the general condition, mileage and wear and tear the car had experienced since first being manufactured.

Although I would expect a car of this age and mileage to show signs of wear and tear and require some general maintenance and upkeep, it would not however be reasonable to supply the car to Mrs S with existing defects that go beyond fair wear and tear, unless these were clearly pointed out before agreeing to acquire the car.

The key considerations in my view here are around whether there is sufficient evidence to demonstrate the car is, or was, defective and if so, whether it was defective at the time it was supplied to Mrs S. And then, if the car was defective, does that defect result in the car being not of satisfactory quality when considering the broader circumstances and condition of the car, and the CRA.

In cases when it is not clear what happened or where the evidence is incomplete or inconclusive, I base my decision on the balance of probabilities. In other words, what I

consider is most likely to have happened in the light of the available evidence.

There appears to be no dispute that the car is now defective and that this defect was first reported by Mrs S at the end of March 2022. This is approximately 78 days after Mrs S had acquired the vehicle. Although the mileage on that day is not known, shortly after on 19 April 2022 the mileage was recorded as being 86,983 when it was inspected by a third party garage.

I accept that this is not a new car and that had Mrs S kept the car for the duration of the hire purchase agreement it is very likely that she would have incurred general maintenance and upkeep costs. Components do wear out and fail and I'm sure Mrs S would have realised this acquiring a car that was 11 years old with more than 85,000 miles travelled. But Mrs S had only had the car a very short amount of time and had only travelled approximately 1,800 miles before the fault became apparent. I think it's also worth highlighting that Mrs S lives more than 300 miles from where she acquired the car, so around one sixth of the 1,800 miles was simply driving home with the vehicle.

Borderway refers to some pre-sale work carried out on the car and that it was MOT'd on 4 January 2022 and believes that had the dynamic anti roll bar been leaking at that time it would have been picked up and highlighted. So it believes that as this wasn't highlighted in the MOT it was not leaking then and simply started leaking after Mrs S acquired the car. I accept this is a possibility but having considered all of the available evidence I think that is unlikely. I think it more likely than not that the leak was present prior to Mrs S acquiring the car and this should have been identified and fixed before the car was sold.

Mrs S had the car only a short period of time and had not travelled a significant number of miles. I think it is unlikely that the leak would have started and been sufficient enough to drain the fluid reservoir to the point of creating a warning on the dashboard over such a short period and mileage. Even allowing for the age and mileage of the car I do not consider it reasonable supplying a car that was defective. And when considering the requirements of the CRA I consider it more likely than not that the car was not of satisfactory quality when it was supplied to Mrs S.

It has been highlighted that in a prior MOT a leak was identified with the same active anti roll bar. This was only marked as an advisory on the MOT as the leak was 'not excessive'. So there would be no requirement to actually repair the leak to pass the MOT. It would not be possible to say with any certainty whether the leak was repaired at the time and has then subsequently failed. Or if the leak was not repaired at the time and it has remained leaking slowly ever since, being topped up with fluid as and when it gets very low. Considering the significant repair costs it is possible that the leak has never actually been fixed and a cheaper alternative was to keep topping up.

Ultimately it will not be possible to say with certainty whether the leak was fixed. But as I have already highlighted above, I think it more likely than not that the leak was already present prior to Mrs S acquiring the car. And that has resulted in the car being not of satisfactory quality.

Putting things right

As I have found the car was not of satisfactory quality when supplied to Mrs S I have next considered what would be a reasonable remedy. The CRA sets out different remedies and these range from repairing or replacing the car, to allowing Mrs S to reject the car. Had Borderway dealt with Mrs S's complaint fairly at the time and found that the car was not of satisfactory quality it may have been reasonable to arrange for the car to have been repaired without cost to Mrs S. However, considering the very short amount of time Mrs S has

actually had use of the car, the 10 months the car has not been used and concerns Mrs S has about the repairs being correctly completed, I think it would be fair and reasonable in the circumstances here to allow Mrs S to reject the car.

Borderway should therefore arrange for the car to be collected, at no cost to Mrs S and cancel the hire purchase agreement so that nothing further is due. Mrs S has not had use of the car since the end of March 2022 so it would be unreasonable to expect her to pay for that use. Any repayments made after March 2022 should therefore be refunded to Mrs S, with interest. If repayments have stopped to the hire purchase agreement, Borderway should ensure no adverse information is recorded on Mrs S's credit file. The hire purchase agreement shows that Mrs S had a deposit of £6,410.79, after settling any prior outstanding finance, and this should also be refunded to Mrs S, again with interest.

Mrs S incurred additional expense through inspection reports and these were £65 and £78 respectively. These amounts should also be refunded to Mrs S as she would not have incurred this expense if the car had been of satisfactory quality. Interest should be added to these sums.

Mrs S incurred an £80 cost relating to transferring her private registration plate and has had little or no benefit from this as the car has barely been used. Assuming Mrs S wishes to keep the private registration for a subsequent vehicle, Mrs S should arrange for the registration to be swapped before the car is collected. Borderway should however refund the £80 cost Mrs S incurred when switching the registration. Interest should be added to this too.

Interest should be calculated at 8% simple per year on each of the refunded amounts from the date of payment until the date of settlement.

Finally, I consider that Mrs S has been put through some degree of trouble and upset having been supplied with a car that was not of satisfactory quality. The car has remained on her drive for a considerable time, she has been required to make alternative travel arrangements and had multiple trips to garages to investigate the fault. Borderway should make an additional payment to Mrs S to reflect this and I consider £200 to be reasonable in the circumstances here.

My final decision

My final decision is that I uphold Mrs S's complaint against Borderway Finance Limited and direct it to:

- collect the car at no further cost to Mrs S,
- end the agreement with nothing further to pay,
- refund the deposit of £6,410.79 and all repayments made after 28 March 2022,
- refund the £65 and £78 diagnostic report costs,
- refund the £80 cost to transfer the personalised registration, and
- pay £200 for the trouble and upset caused.

Interest should be added to the refunded sums, as set out above. If Borderway does not settle the complaint within 28 days of Mrs S accepting this decision, interest at the same rate should be added to the £200, from the date of this decision until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 22 February 2023.

Mark Hollands
Ombudsman